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Mr. Justice Harlan

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MR. JUSTICE HARLAN

The appointment of John Marshall Harlan to the Supreme Court has been received with widespread approval. The New York Times, for instance, has said that he is "an outstanding selection for the post."[1] The Court lost a valuable member when Mr. Justice Jackson died, and it is indeed fortunate that his successor is a jurist of Justice Harlan's capacity.

The newest Justice comes from a family devoted to public service in the law. His great-grandfather was an attorney, and his grandfather, as is well known, was also Mr. Justice John Marshall Harlan. The first Justice Harlan sat on the Supreme Court for thirty-four years, from 1877 to 1911, one of the longest periods of service on the Court. The present Justice's father was also an attorney, and was a member of the Interstate Commerce Commission.

John Marshall Harlan was born in Chicago on May 20, 1899. At fifty-five, he is the second youngest member of the present Court. Only Justice Clark is younger, by barely a few months.

After elementary schooling here and in Canada, Har-

1 Editorial, N.Y. Times, Feb. 3, 1955, p. 22, col. 2.

lan studied at Princeton University (A.B., 1920). He was a Rhodes Scholar for three years at Balliol College, Oxford University (B.A., M.A., 1923), where he commenced the study of law. Upon returning to this country, he completed his law work at New York Law School (LL.B. 1924), and was admitted to practice in New York in 1924.

For the next thirty years, Harlan was an active and a busy practicing lawyer. His field was litigation, almost exclusively, but of all types and in all its aspects. He began as an apprentice in the office of Root, Clark, Buckner & Ballantine, and became a member of the firm in 1932. He soon was one of New York's leading trial and appellate lawyers. His last case was the immense anti-trust proceeding against the du Ponts, General Motors and United States Rubber Company, in which he represented certain defendants.[2]

The thread of roughly the first half of Harlan's career is to be found in a close association with Emory R. Buckner. Mr. Buckner was not only an outstanding trial lawyer and leader of the Bar, but a remarkable person as well, with a deep interest in the training of young lawyers and in furthering their careers.

As Justice Harlan has put it, he started out by carrying Mr. Buckner's bag to court. In 1925, Buckner was appointed United States Attorney for the Southern District of New York, and Harlan became an Assistant United States Attorney. Here he tried the usual run of federal criminal cases, and also assisted Buckner in a number of other cases. Noteworthy among the latter was *United States v. Miller,* a prosecution for conspiracy to defraud the United States. The defendants were Harry M. Daugherty, the former Attorney General of the United States, and Thomas W. Miller, former Alien Property Custodian, the case arising out of irregularities in the office of the

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[2] See p. 355, *infra.*

custodian.[3]

Buckner and Harlan returned to their firm in 1927, but Buckner was soon called upon for further public service. He became counsel in an investigation of sewer graft scandals in Queens County, New York, and later he was appointed special prosecutor. Buckner made Harlan his principal assistant.

As a result of the investigation, Maurice E. Connolly, the Borough President of Queens, and others were convicted of conspiracy to defraud.[4] The case was noteworthy in several respects. No graft was traced directly to Connolly, but the prosecution did show that he had used substantial amounts of cash in excess of his salary and apart from any bank account. He attempted no explanation of the source of any of this cash. It was held that this evidence, plus other circumstantial evidence tying him to the conspiracy, could be found by the jury to show improper motive on his part. This was one of the first successful prosecutions upon this type of circumstantial evidence.[5] The prosecution also broke new ground in its methods of proof of complicated financial data, particularly in the use of simplified charts which were available for the study of the jury.

In the 1930's, Harlan became his firm's second trial man, behind Buckner. The latter, however, had several periods of ill health and the burden of the firm's litigation fell increasingly on Harlan's shoulders. An early illustration, of great significance in Harlan's career, was the Wendel estate litigation.

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[3] The jury disagreed as to Daugherty and the indictment against him was later dismissed. Miller was convicted and the affirmance of his conviction appears in Miller v. United States, 24 F.2d 353 (2d Cir. 1928), *cert. denied*, 276 U.S. 638 (1928).

[4] People v. Connolly, 253 N.Y. 330, 171 N.E. 393 (1930), affirming, 227 App. Div. 167, 237 N.Y. Supp. 303 (2d Dep't 1929).

[5] *Cf.* Holland v. United States, 348 U.S. 121 (1954); Smith v. United States, 348 U.S. 147 (1954); United States v. Calderon, 348 U.S. 160 (1954).

Miss Wendel died in 1931, leaving a fortune of about $40,000,000 and a will bequeathing it mainly to charities. There were no close relatives, but several thousand distant or purported close relatives flocked in to contest probate.[6] Buckner was engaged as trial counsel for the proponent of the will, but when he became ill, Harlan took charge of the case. Several who alleged that they were the nearest relatives were unmasked as impostors, their claims being based in part on forged documents. This involved careful detective work by Harlan and his staff and difficult and extended trials.[7] The most notorious claimant went to jail for the fraud which was thus uncovered.[8] The will ultimately was probated after a settlement with the nearest bona fide relatives.

Upon Mr. Buckner's untimely disability and death, Harlan became the leading trial lawyer of Root, Clark, Buckner & Ballantine. In the years preceding the war he was in charge of many law suits, only three of which will be mentioned here. He represented the New York City Board of Higher Education in the litigation challenging Bertrand Russell's appointment to teach in the College of the City of New York.[9] In *Randall v. Bailey,*[10] he unsuccessfully argued that corporate directors should not be permitted to declare dividends out of surplus created by revaluing fixed assets upwards, the appreciation being as

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6 *In re* Wendel's Will, 143 Misc. 480, 257 N.Y. Supp. 87 (Surr. Ct. 1932).

7 *In re* Wendel's Estate, 146 Misc. 260, 262 N.Y. Supp. 41 (Surr. Ct. 1933); *In re* Wendel's Estate, 148 Misc. 884, 267 N.Y. Supp. 33 (Surr. Ct. 1933); *In re* Wendel's Estate, 159 Misc. 443, 287 N.Y. Supp. 893 (Surr. Ct. 1936).

8 See People v. Morris, 151 Misc. 212, 270 N.Y. Supp. 901 (Ct. Gen. Sess. 1934).

9 Kay v. Bd. of Higher Education, N.Y. City, 260 App. Div. 9, 20 N.Y.S.2d 898 (1st Dep't 1940), *leave to appeal denied,* 260 App. Div. 849, 23 N.Y.S.2d 479 (1st Dep't 1940). See also Kay v. Bd. of Higher Education, N.Y. City, 173 Misc. 943, 18 N.Y.S.2d 821 (Sup. Ct. 1940), *aff'd without opinion,* 259 App. Div. 879, 20 N.Y.S.2d 1016 (1st Dep't 1940), *leave to appeal denied,* 259 App. Div. 1000, 21 N.Y.S.2d 396 (1st Dep't 1940), 284 N.Y. 578, 29 N.E.2d 657 (1940).

10 288 N.Y. 280, 43 N.E.2d 43 (1942).

yet unrealized.[11] He also represented American Optical Company in a prolonged anti-trust trial. (The case was suspended during the war and finally settled.)

During World War II, Harlan was a Colonel with the Eighth Air Force in England, and was in charge of its Operations Analysis Section. This comprised a group of engineers, physicists, mathematicians and others with technical training (with a sprinkling of very capable attorneys), about one hundred men at a maximum. The Section had no operational duties or responsibilities. It was free on a roving basis to investigate and give detached study to any aspect of operations and to devote its specialized skills to their improvement. In particular, troublesome problems which might arise from time to time would be referred to it, such as to discover why in some circumstances bombing accuracy was less than expected, or to determine what were the optimum forces to attack certain types of objectives.

Colonel Harlan organized and supervised this Section, which pioneered the idea in the Air Force. The group was very effective, and its success led to the formation of similar organizations by other components of the American Air Force. Colonel Harlan was decorated with the Legion of Merit, and with the French and Belgian Croix de Guerre.

Mr. Harlan's first case upon his return to civilian life in 1945 was also his first opportunity to argue before the

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[11] Harlan's view as to the correct rule of law in the Randall v. Bailey situation did not change upon his becoming a judge. In Commissioner v. Hirshon Trust, 213 F.2d 523, 527 (2d Cir. 1954), *cert. denied*, 348 U.S. 861 (1954), he said: ". . . The 'capital impairment' statutes of some states permit unrealized appreciation to be calculated in determining corporate surplus available for dividends. *E.g.*, § 58, N.Y. Stock Corporation Law, McKinney's Consol. Laws, c. 59; Randall v. Bailey, 1942, 288 N.Y. 280, 43 N.E.2d 43. Other states, perhaps more in keeping with sound accounting and business practice, do not permit unrealized appreciation to be counted in computing corporate surplus, in determining which the corporate assets are to be reckoned at their historical cost. *E.g.*, Ill. Rev. Stats. 1951, c. 32, § 41(c), S.H.A. Ill. ch. 32, § 157. 41(c); Penn. Stats., Tit. 15, §§ 2852-701, subd. A (1), 702 (Purdon 1936)."

United States Supreme Court. The United States had filed an anti-trust suit against foreign diamond mining companies, and promptly obtained a preliminary injunction tying up all of the property of the defendants in this country. The injunction was thought to be justified as insuring the appearance of the defendants at the trial. The defendants could not appeal from the injunction, since the anti-trust laws allowed appeals only from final judgments. The Supreme Court, however, by a 5-4 vote, agreed with Harlan's argument that it had jurisdiction to review the case by issuing an extraordinary writ of certiorari. On the merits, the injunction was reversed as beyond the power of the District Court.[12]

Harlan also was successful in his argument of the *Beneficial* case before the Supreme Court.[13] This has become the leading case in the federal courts on the appealability of intermediate orders which display some elements of finality, and also a leading case in the field of derivative stockholder suits. The Court upheld the constitutionality of a state statute making unsuccessful plaintiffs in stockholder's suits liable for the reasonable expenses and attorneys' fees of the defendants and entitling the corporation, at any stage of the suit, to require security for their payment. The Court went on to hold, by a 6-3 vote, that this statute should be applied in the federal courts in diversity of citizenship cases.

The greatest portion of Harlan's time in this post-war period was spent in two anti-trust cases against E. I. du Pont de Nemours and Company. Both cases involved protracted periods of preparation and long and arduous trials. The first involved what was found by the District Judge

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12 De Beers Mines v. United States, 325 U.S. 212 (1945). The jurisdictional question was discussed at greater length in U.S. Alkali Ass'n v. United States, 325 U.S. 196 (1945).

13 Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949), *affirming sub nom.*, Beneficial Industrial Loan Corp. v. Smith, 170 F.2d 44 (3d Cir. 1948).

to be an international cartel, covering substantially the entire chemical field.[14] In the second, the United States charged a gigantic conspiracy, among du Pont, members of the du Pont family and two holding companies, to control du Pont, General Motors and United States Rubber Company. The purpose of this alleged conspiracy was to require each company to purchase from the others, and to avoid competing with the others. This case in particular raised important issues, not only to the companies involved but to the country generally. The District Court has completely rejected these charges,[15] and the case has been appealed to the Supreme Court, apparently on a somewhat different theory.

It is of course impossible within reasonable compass to review each of the innumerable cases in which Mr. Harlan has participated in his busy career; the above are a few of the highlights. His practice was naturally weighted in the direction of the corporate and commercial litigation most prevalent in downtown New York law firms, but it was not so limited. Harlan is, for instance, unusually experienced in criminal litigation, not only as a prosecutor but also in some cases as attorney for the defendant. Also uncommon in such a practice is the fact that in the stockholder type of litigation, he has on occasion represented plaintiffs as well as defendants.[16] His broad experience in practice will undoubtedly be of great value in his further judicial work.

As an advocate, and particularly as an appellate advocate, Harlan was superb. Certain Justices of the Supreme Court expressed the opinion that Harlan's arguments be-

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14 United States v. Imperial Chemical Industries, 100 F. Supp. 504 (S.D. N.Y. 1951); *on decree,* 105 F. Supp. 215 (S.D.N.Y. 1952).

15 United States v. E. I. du Pont de Nemours and Company, 126 F. Supp. 235 (N.D. Ill. 1954).

16 Ewen v. Peoria & E. Ry., 78 F. Supp. 312 (S.D.N.Y. 1948), *cert. denied sub nom.,* Income Bondholders v. New York Central R.R., 336 U.S. 919 (1949); Wood v. New York Central R.R., 286 I.C.C. 373 (1952).

fore them were among the best they had heard. His principal asset was his ability to make sense to the Court, no matter how complex the issue. He argued simply and interestingly, and got across his ideas and arguments with the utmost lucidity. Back of this, of course, was hard work. Even as a senior partner in Root, Ballantine, Harlan, Bushby & Palmer (as his firm was called when he left it), he worked as long and as hard as even the most junior associate. But it also involved the ability to analyze the problems involved in his cases, particularly in developing theories of the facts and law to advance his cause. He was especially skillful in organizing and supervising the work of his staff, both legal and non-legal. In view of the importance of his cases, his staff was frequently quite large, and its efficient direction required legal and practical ability of the highest order.

In a sense, Harlan's judicial career is an extension of his life-long devotion, in the best tradition of the Bar, to public service. We have already seen his work in the United States Attorney's office and in the Connolly investigation, and his wartime service. He was also counsel to the New York Crime Commission from 1951 to 1953. This investigation uncovered several unsavory instances of local corruption in New York State. It also looked into racketeering and crime on the waterfront in and around New York City, leading to the establishment of the Waterfront Commission of New York Harbor.[17] Harlan was always active in bar associations, serving for several years as Chairman of the Committee on Professional Ethics of the Association of the Bar of the City of New York and later as Chairman of its Committee on the Judiciary and as Vice President of the Association. He was a director of the Legal Aid Society.

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[17] Laws of New York, 1953, Chs. 882, 883; Laws of New Jersey, 1953, Chs. 202, 203; Public Law 252, Ch. 407, 83d Cong., 1st Sess., 67 STAT. 541.

In January 1954, the President nominated Harlan for the post of United States Circuit Judge for the Second Circuit. Judge Harlan took his seat on March 6, 1954, and accordingly served for approximately one year on the Court of Appeals. This is of course insufficient to permit of more than a tentative appraisal of his judicial career.

At the arguments before the Court of Appeals, Judge Harlan was rather free with his questioning of attorneys (perhaps, a reflection of his own statements, while practicing, that he preferred to argue before judges who asked questions). However, he was careful not to take the argument away from counsel, and his questions were usually very pertinent. They frequently indicated that the Judge had prepared himself to some extent before the argument, an aid which counsel do not usually experience.

Up to the end of February, 1955, Judge Harlan had sat in 85 decided cases. Of these, 26 were disposed of in per curiam opinions. In the other 59 cases Judge Harlan wrote the opinion of the Court in 23; he dissented only twice. Oddly enough, each dissent was in a case requiring the interpretation of the Supreme Court's mandate on a prior appeal.[18]

Judge Harlan's opinions are written clearly and carefully. They indicate that a great deal of work, including original research, went into them.[19] A substantial number required the interpretation of statutes. Here Judge Harlan conscientiously sought to construe these laws in accordance with their broad purpose, rather than me-

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[18] United States v. Chiarella, 214 F.2d 838 (2d Cir. 1954), *cert. denied*, 348 U.S. 902 (1954); United States *ex rel.* Accardi v. Shaughnessy, 219 F.2d 77 (2d Cir. 1955), *cert. granted*, 348 U.S. 962 (1955).

[19] See, for instance, Dixon v. United States, 219 F.2d 10 (2d Cir. 1955), involving the admiralty doctrine of unseaworthiness, and also two conflict of law cases, Bournias v. Atlantic Maritime Co., ... F.2d ... (2d Cir. Feb. 10, 1955), and Siegelman v. Cunard White Star Ltd., ...F.2d... (2d Cir. Feb. 17, 1955).

chanically.[20] His tax opinions, for instance, are practical rather than literal interpretations of the Code.[21] In a bankruptcy case, he expressed the belief that state recordation statutes should not be construed "needlessly to destroy conditional sales contracts."[22] He also attempted to apply procedural rules with common sense.[23]

Most public attention has been given to his opinion affirming the conviction under the Smith Act of the so-called second string Communists.[24] A number of others are mentioned in the footnote.[25]

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Justice Harlan has the ability, the experience and the personality to become a valuable member of the Supreme Court. His lifetime of active practice is one asset in which the present Court is not particularly strong, since many

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20 See particularly Panella v. United States, 216 F.2d 622 (2d Cir. 1954), interpreting the Federal Tort Claims Act, and United States v. Wiesner, 216 F.2d 739 (2d Cir. 1954), involving the 1948 revision of the Criminal Code.

21 Newton v. Pedrick, 212 F.2d 357 (2d Cir. 1954); Niles-Bement-Pond Co. v. Fitzpatrick, 213 F.2d 305 (2d Cir. 1954); Commissioner v. Hirshon Trust, 213 F.2d 523 (2d Cir. 1954), *cert. denied,* 348 U.S. 861 (1954); Lupia's Estate v. Marcelle, 214 F.2d 942 (2d Cir. 1954), *aff'd,* 348 U.S. 956 (1955); Lewyt Corp. v. Commissioner, 215 F.2d 518 (2d Cir. 1954), *cert. granted,* 348 U.S. 895 (1954); Commissioner v. Watson's Estate, 216 F.2d 941 (2d Cir. 1954).

22 Cummings-Landau Laundry Machinery Co. v. Alderman, 212 F.2d 342, 346 (2d Cir. 1954).

23 Hyam v. American Export Lines, 213 F.2d 221 (2d Cir. 1954); O'Donnell Transp. Co. v. City of New York, 215 F.2d 92 (2d Cir. 1954); Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954); Constance v. Harvey, 215 F.2d 571 (2d Cir. 1954), *cert. denied,* 348 U.S. 913 (1955); Perkins v. United Transp. Co., 219 F.2d 422 (2d Cir. 1955); see also United States v. H. Wool & Sons, 215 F.2d 95 (2d Cir. 1954).

24 United States v. Flynn, 216 F.2d 354 (2d Cir. 1954), *cert. denied,* 348 U.S. 909 (1955).

25 Air Line Pilots Ass'n, Internat'l v. Civil Aeronautics Bd., 215 F.2d 122 (2d Cir. 1954) (refusing to stay CAB regulations as to hours of service); Austrian v. Williams, 216 F.2d 278 (2d Cir. 1954), *cert. denied, sub nom.,* Fogarty v. Austrian, 348 U.S. 953 (1955) (holding exclusive jurisdiction to award certain fees and expenses to be in bankruptcy court); United States *ex rel.* Leong Choy Moon v. Shaughnessy, 218 F.2d 316 (2d Cir. 1954) (refusing to set aside an order for deportation of an alien to Communist China, but giving the alien a further opportunity to choose deportation to Formosa); Perma-Fit Shoulder Pad Co. v. Best Made Shoulder Pad Corp., 218 F.2d 747 (2d Cir. 1955) (holding patent invalid and not infringed).

of the Justices came to the Court from political or academic life. His habits of hard work and clear thinking should also serve him in good stead. As the President said, "Judge Harlan's qualifications for [the post of Justice] are of the highest. Certainly, they were the highest of any that I could find."[26]

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[26] N.Y. Times, Feb. 3, 1955, p. 12, col. 5.

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